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JUDGE: M. A. Mahoney
PARTIES: Vernon T. Andrews, Janice E. Andrews, Regions Bank
CHAPTER: 7
ATTORNEYS: C. M. Smith, W. A. Gray, Jr.
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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

IN RE:

VERNON T. ANDREWS and
JANICE E. ANDREWS

Case No. 98-13317-MAM-7

ORDER GRANTING THE MOTION OF REGIONS BANK FOR RELIEF FROM STAY

C. Michael Smith, Mobile, Alabama, attorney for debtors
W. Alexander Gray, Jr., Mobile, Alabama, attorney for Regions Bank

This matter came before the Court on the motion of Regions Bank for relief from the automatic stay pursuant to 11 U.S.C. § 362(d). The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 1334 and 157 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b) and the Court has the authority to enter a final order. For the reasons indicated below, the motion of Regions Bank for relief from the automatic stay is granted.

FACTS

Vernon T. and Janice E. Andrews ("debtors" or "the Andrews") filed a joint petition for relief under chapter 7 of the Bankruptcy Code on September 15, 1998. The Andrews' had granted Regions Bank a mortgage on their home in January 1997 in return for a $30,000 line of credit. The mortgage was duly recorded on January 30, 1997. On October 22, 1998, the Court granted Regions Bank relief from the automatic stay to proceed with foreclosure of debtors' homestead. Regions Bank conducted the foreclosure sale on November 18, 1998 and the property was sold to a third party. After deducting the remaining debt and other charges due under the $30,000 line of credit, there was a surplus of $5,397.55 from the sale. Regions Bank is presently holding this amount subject to further orders from the Court.

The mortgage states that it was granted,

> in consideration of the premises and in order (i) to secure the payment of all indebtedness of Mortgagors to Mortgagee incurred pursuant to the . . . AGREEMENT, including, without limitation, the said initial advance and any and all FUTURE ADVANCES . . . (ii) **to secure the payment of all other indebtedness, now or hereafter owed, by Mortgagors, or any of them, to Mortgagee, not incurred pursuant to said AGREEMENT.**

(bold emphasis added). The mortgage was executed for the purpose of,

> (i) securing the payment of all indebtedness of Mortgagors to Mortgagee incurred pursuant to the . . . AGREEMENT, including, without limitation, the said initial advance and any and all FUTURE ADVANCES . . . (ii) securing **the payment of all other indebtedness, now or hereafter owed, by Mortgagors to Mortgagee, not incurred pursuant to said AGREEMENT.**

(bold emphasis added). The defeasance clause contained in the mortgage provides that the mortgage ceases to be security,

> **if the Mortgagors shall well and truly pay and discharge the indebtedness hereby secured**, including any and all ADVANCES and FUTURE ADVANCES made under the AGREEMENT (which include payment of taxes and insurance, the satisfaction of prior encumbrances and other indebtedness owed to the Mortgagee by the Mortgagors before full payment of this mortgage).

(bold emphasis added). These provisions comprise what is commonly referred to as a dragnet clause.[1]

On October 31, 1997, Regions Bank loaned Budget Repairs and Maintenance, Inc. (Budget) $5,553.74. The loan was secured by accounts receivable, equipment, general intangibles, and inventory as evidenced by a previously executed security agreement. The

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[1]A dragnet clause "purports to include within the coverage of the mortgage all indebtedness of the mortgagor to the mortgagee, in addition to the specific debt secured by the mortgage, whether incurred before or after the execution of the mortgage." Milton Roberts, *Debts Included in Provision of Mortgage Purporting to Cover All Future and Existing Indebtedness (Dragnet Clause) - Modern Status*, 3 A.L.R.4th 690 (1981).

Andrews owned and operated the business. The Andrews both had executed continuing guaranty agreements in which they agreed to guaranty payment of the debts of Budget to Regions Bank. The continuing guaranty agreements and the security agreement between Budget and Regions Bank were executed on March 28, 1995. The continuing guaranty agreements contain provisions in which debtors agree that "any security interest or mortgage you [debtors] have given to us [Regions Bank] in any other document also secures your obligations under this Agreement." As of the filing of this motion, the Andrews owed Regions Bank approximately $5,738.88 pursuant to their guaranty of the indebtedness of Budget.

The determinative issue for this motion for relief from stay is whether the mortgage secures the indebtedness incurred by the Andrews under their agreement to guaranty repayment of any indebtedness of Budget. Regions Bank contends that its claim for the $5,738.88 owed pursuant to the Andrews' guaranty is secured by the mortgage. If true, Regions Bank would be entitled to apply the $5,397.55 surplus to the remainder of its secured claim ($5,738.88). The Andrews contend that the mortgage was not intended to secure their guaranty of the indebtedness of Budget.

LAW

Alabama law is applied to determine if the Andrews' indebtedness under their guaranty agreements is secured by the mortgage. *Butner v. United States*, 440 U.S. 48, 99 S. Ct. 914, 59 L. Ed. 2d 136 (1979); *Western Farm Credit Bank v. Auza (In re Auza)*, 181 B.R. 63, 68 (9th Cir. BAP 1995). According to Alabama law, the intent of the parties determines whether a mortgage containing a dragnet clause secures other indebtedness. *Bank of Brewton v. General Motors Acceptance Corp.*, 811 F. Supp. 648, 650 (S.D. Ala. 1992) (citing *Ex parte Chandler*,

477 So.2d 360 (Ala. 1985)). It is the duty of the Court to construe the consideration and defeasance clauses together in determining the intent of the parties. *Id*. If the mortgage is unambiguous, the dragnet clause extending the mortgage to other indebtedness between the same parties is given full effect. *Hulsart v. Hooper*, 274 F.2d 403 (5th Cir. 1960) (applying Alabama law). If ambiguous or inconsistent, then it is ineffective because such clauses are strictly construed against the drafter. *In re Bonner*, 43 B.R. 261, 263 (Bankr. N.D. Ala. 1984).

A.

In *Bank of Brewton*, two car dealers granted GMAC an individual mortgage on their "dealership property." On the same day, the dealership received loans from GMAC and the dealers personally guaranteed these debts. Subsequently, the Bank obtained and perfected a security interest in certain vehicles owned by the dealership. The Bank did not dispute that the vehicles were "dealership property" under the mortgage between GMAC and the dealers. The dealership sold the vehicles. The Bank claimed the proceeds under its security agreement. GMAC claimed the proceeds were cross-collateralized by its mortgage. The mortgage did not specify the debts the parties intended to cross-collateralize. However, the mortgage contained a dragnet clause. The court found that the dragnet clause in the mortgage unambiguously secured "all other debts incurred by the borrowers, including the debt evidenced by" the dealers' personal guarantees. The court permitted GMAC to apply the proceeds from the sale of the vehicles to the debt it was owed pursuant to the dealers' guarantees.

The language contained in the mortgage in the *Bank of Brewton* case is almost identical to the mortgage between Regions Bank and the Andrews (see chart):

	Granting Clause	**Defeasance Clause**
Bank of Brewton	all other indebtedness now or hereafter owed . . .	all indebtedness hereby secured
In re Andrews	all other indebtedness, now or hereafter owed, . . .	the indebtedness hereby secured

Thus, like the dragnet clause in *Bank of Brewton*, the dragnet clause in the Andrews' mortgage is unambiguous. It secures all other indebtedness of the Andrews, including that incurred pursuant to a guaranty of a debt of a third party.

The court in *Bank of Brewton* did not discuss the language in the guaranty agreements. Apparently, this was unnecessary because the mortgage was unambiguous. This Court agrees that Alabama jurisprudence renders it unnecessary to examine the document evidencing the other indebtedness if the dragnet clause unambiguously encompasses such indebtedness. *First Nat'l Bank of Guntersville v. Bain*, 188 So. 64 (Ala. 1939) ("clear and express provisions extending security to other existing indebtedness or to future indebtedness between the same parties are given full effect. . . ."). Since the dragnet clause unambiguously covers the guaranty indebtedness, there is no need to examine the continuing guaranty documents or the documents evidencing Budget's indebtedness.[2]

Unlike the debtors in *Bank of Brewton*, the Andrews mortgaged their home rather than business property. However, examination of a dragnet clause is the same under Alabama law

[2]Some states do not confine their analysis to the mortgage document even if it is unambiguous. Instead, they analyze the relationship of the loans and/or whether the mortgage was relied upon as security for the other indebtedness. *See, e.g.*, *Western Farm Credit Bank v. Auza (In re Auza)*, 181 B.R. 63 (9th Cir. BAP 1995); *Garrote v. Ocean Bank*, 713 So.2d 1095 (Fla. App. 3 Dist. 1998); *Decorah State Bank v. Zidlicky*, 426 N.W.2d 388 (Iowa 1988); *Pearll v. Williams*, 704 P.2d 1348 (Ariz. App. Div. 2 1985).

whether the clause is contained in a home mortgage or a mortgage securing business property. *See Underwood v. Jarvis*, 358 So.2d 731 (Ala. 1978) (involved effectiveness of dragnet clause in mortgage on homestead); *In re Bonner*, 43 B.R. 261 (Bankr. N.D. Ala. 1984). The court in *Bank of Brewton* applied the same test used by Alabama courts while examining the effectiveness of dragnet clauses contained in home mortgages. *Bank of Brewton*, 811 F. Supp. at 650 (citing *Underwood*, 358 So.2d 731). Thus, despite the different nature of the property mortgaged in this case and in *Bank of Brewton*, the nearly identical language contained in the dragnet clauses in both cases compels this court to reach the same conclusion as the court in *Bank of Brewton* (i.e., the guaranty indebtedness is secured by the mortgage).

Another distinction between *Bank of Brewton* and this case is that the Andrews executed their continuing guaranty agreements almost two years prior to their mortgage, while the personal guarantees in *Bank of Brewton* were incurred on the same day as the mortgage. In some jurisdictions antecedent debts will not be included withing the scope of a mortgage's dragnet clause unless such debts are specifically identified in the mortgage. *See, e.g., United Nat'l Bank v. Tellam*, 644 So.2d 97 (Fla. App. 3 Dist. 1994); *Lundgren v. Nat'l Bank of Alaska*, 756 P.2d 270, 278 (Alaska 1987); *First Nat'l Bank & Trust Co. v. Lygrisse*, 647 P.2d 1268 (Kan. 1982). One rationale is that since the antecedent debt is already owed, the parties would not have a reason not to identify the debt in the subsequent mortgage. *Lundgren*, 756 P.2d at 278; *In re Bass*, 44 B.R. 113 (Bankr. D.N.M. 1984) (dragnet clause in mortgage on debtors' home did not encompass antecedent debt which was based on debtors' guaranty of their corporation's loans). However, under Alabama law a clear and explicit dragnet clause encompasses other indebtedness regardless of when such indebtedness was incurred. *Dixie Ag Supply, Inc. v.*

Nelson, 500 So.2d 1036, 1040 (Ala. 1986) (security agreement containing a dragnet clause with general reference to "any and all indebtedness" deemed sufficient to cross-collateralize an antecedent debt). Although *Dixie AG* addressed the validity of a dragnet clause in a security agreement governed by article 9 of Alabama's Commercial Code, as opposed to a home mortgage, the case is instructive because under Alabama law dragnet clauses in both types of documents are given full effect if the documents are unambiguous. *Southern Ready Mix, Inc. v. AmSouth Bank, N.A.*, 576 So.2d 188 (Ala. 1991) (dragnet clause in a security agreement); *Bain*, 188 So. 64 (home mortgage). The language contained in the dragnet clause in *Dixie Ag* ("all indebtedness . . . due or to become due, and whether now or existing hereafter arising . . . ") is very similar to that contained in the Andrews' mortgage ("all indebtedness, now or hereafter owed . . ."). Based primarily on *Dixie AG*, this court finds that, even assuming the Andrews' guaranty indebtedness was incurred prior to the mortgage,[3] it is secured by the mortgage under Alabama law.

In sum, the dragnet clause in the Andrews' mortgage is unambiguous. It effectively cross-collateralizes past, present, and future indebtedness. Consequently, the indebtedness the Andrews incurred under their continuing guaranty agreements are secured by the mortgage on their home.

B.

[3]Arguably, the guaranty indebtedness was incurred subsequent to the mortgage because the corporate debt which was covered by the guaranty agreement was not incurred until October 31, 1997, approximately ten months after the mortgage was executed. *See Kesling v. Bank of America Nat'l Trust and Sav. Ass'n (In re Kesling)*, 449 F.2d 770 (9th Cir. 1971) (debtors become liable for loans extended to company under continuing guaranty upon company's default).

The Andrews contend that the defeasance clause only covers "indebtedness" that resulted from an advance or a future advance. Their debt arises from a loan to a third party which they guaranteed, rather than from a future advance. Therefore, debtors contend it is unclear whether the mortgage secures their guaranty indebtedness. They argue that this ambiguity would require the court to strictly construe the mortgage against Regions Bank and render the dragnet clause ineffective.

The problem with debtors' interpretation of the contract is that it neglects to take into account the entire defeasance clause. The initial line of the clause requires the mortgagors to discharge "the indebtedness hereby secured." According to the defeasance clause, such indebtedness includes future advances, but such indebtedness is not limited to future advances. The reference to future advances in the defeasance clause is merely illustrative, not exclusive. The "granting clause" and the provision regarding the purpose of the mortgage clearly indicate that the indebtedness secured by the mortgage, or "hereby secured" as the defeasance clause states, includes all indebtedness now or hereafter owed even if such indebtedness is not covered by the agreement which the mortgage secures. This language clearly includes indebtedness incurred by way of a guaranty. *See Crescent Credit Corp. v. Union Bank & Trust Co. of Montgomery*, 288 So.2d 744 (Ala. Civ. App. 1974) (mortgage covered indebtedness of mortgagor as surety for debts of corporation).

THEREFORE IT IS ORDERED:

1. The motion of Regions Bank is GRANTED and the automatic stay is lifted so that Regions Bank may apply the proceeds remaining from the foreclosure sale to the indebtedness

Vernon T. and Janice E. Andrews incurred under their guaranty of the indebtedness of Budget Repair and Maintenance, Inc.;

2. The objection of Vernon T. and Janice E. Andrews to the motion of Regions Bank for relief from stay is OVERRULED.

Dated: March 1, 1999

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE